SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1178

FLUOR CORPORATION, LTD., *et al.*, UNION TANK CAR COMPANY, WARD INDUSTRIES CORPORATION,

Appellants and Cross-Appellees,

vs.

UNITED STATES OF AMERICA, *ex rel.* MOSHER STEEL COMPANY,

Appellees and Cross-Appellants.

REPLY BRIEF OF PETITIONER, WARD INDUSTRIES CORPORATION

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REPLY BRIEF OF PETITIONER, WARD INDUSTRIES CORPORATION

I.

Mosher's Recovery Against IMI Individually in IMI's Individual Bankruptcy Completely Precludes Its Attempted Recovery Against Ward in This Action as a Member of the Joint Venture of IMI-Ward.

The inability of Mosher to respond to the substantial questions of law under the Bankruptcy Act presented by Ward's certiorari petition is vividly demonstrated by the following blithe and demonstrably erroneous assertions at pages 5-6 of its answering brief:

> "Ward claims an equitable estoppel against Mosher on the theory that an inconsistency exists between

> Mosher's status as a creditor of IMI in the Chapter XI reorganization of IMI and its status as a creditor of the IMI-Ward joint venture.
>
> * * *
>
> But the basic answer to the claim of estoppel is that no inconsistency exists between Mosher's claim in the reorganization proceeding and its claim here. It is simply not true that Mosher's claim in the reorganization proceeding was asserted as an individual obligation of IMI created by its independent undertaking as opposed to IMI's obligation as a member of the IMI-Ward joint venture."

It is impossible to comprehend Mosher's statement that "no inconsistency exists between Mosher's claim in the reorganization proceeding and its claim here." It is equally impossible to comprehend its further statement that its claim against IMI in the bankruptcy proceedings was *not* asserted "as an individual obligation of IMI . . . as opposed to IMI's obligation as a member of the IMI-Ward joint venture." On the contrary, under Bankruptcy law, Mosher could not possibly have filed a claim or recovered a judgment against IMI, if it were a creditor of the joint venture, and not a creditor of IMI individually. The following undisputed facts are totally dispositive of Mosher's claim against Ward as a matter of law:

(1) The bankruptcy of IMI was the individual bankruptcy of IMI alone. No petition in bankruptcy was ever filed by Ward or the joint venture of IMI-Ward.

(2) IMI was the owner of seven divisions located in California, Colorado and Arizona, 50% of the production of which represented individual contracts in which IMI was individually engaged. In connection therewith, IMI incurred substantial individual obligations and realized

substantial individual accounts receivable. Both the accounts receivable as well as the accounts payable were due and owing from and to IMI *individually* and were in no way connected with or related to the joint venture of IMI-Ward.

(3) Mosher filed its proof of claim in the individual bankruptcy of IMI as an individual creditor of IMI, and *not* as a creditor of the joint venture of IMI-Ward. *Had it filed its claim against IMI as a creditor of the joint venture of IMI-Ward, it could not lawfully have shared in the individual assets of IMI as an individual creditor of IMI pro rata with all other individual creditors of IMI.*

(4) In its proof of claim, Mosher swore that IMI, *individually,* was "justly and truly indebted to the plaintiff corporation for the sum of $321,053.54", the exact sum for which the present action was brought against Ward as a member of the joint venture. (Finding 52, Mosher Br., App. B. p. B-21)

(5) The final judgment entered by the Bankruptcy Court on December 31, 1963 allowed Mosher's claim as a creditor of IMI individually in full for the sum of $321.053.54. IMI was ordered to issue 642,107 shares of its capital stock to Mosher in full satisfaction and extinguishment of its individual claim. (Finding 53, Mosher Br., App. B, p. B-21) The value of those shares of stock was stipulated to be the sum of $52,170.62, approximately 16% of the amount of Mosher's claim. All other individual creditors of IMI were treated alike.

(6) Since the individual creditors of IMI were *not* paid in full, obviously no surplus remained of the individual assets of IMI which could possibly be applied to the claim of any creditor of the joint venture.

II.

The Alleged Liability of Ward as a Joint Venturer Is Entirely Different From the Obligation of Union Upon Its Separate and Independent Agreement With Mosher.

In its attempt to obfuscate the issues presented by Ward's petition, Mosher has indiscriminately lumped Ward, Union, Fluor and the Sureties together (Mosher Br., pp. 7-12). It has totally ignored the fact that the Mosher claim against Ward in this action was not based upon a separate and independent covenant. The *only* basis of Mosher's claim against Ward was Ward's relationship to the joint venture of IMI-Ward. Ward has been held liable to Mosher solely and only as an incident and consequence of partnership law.

Thus, the District Court ruled in its Conclusions of Law that "Ward, as a member of IMI-Ward is obligated to Mosher. . . ." (Conclusion 4, Mosher Br., App. B. p. B-22). The Circuit Court likewise ruled that Ward was liable because "IMI's acts were authorized by and performed on behalf of the IMI-Ward joint venture" (App. 8a).

On the other hand, Mosher's claim against Union was predicated upon a direct, express and individual promise and undertaking by Union to Mosher which was wholly separate from, and independent of, any obligation undertaken by the joint venture to Mosher. Indeed, the Court of Appeals ruled that the obligation undertaken by the joint venture to Mosher occurred subsequent to the independent agreement between Mosher and Union. (Appendix, p. 7a)

Consequently, the judgment of the Bankruptcy Court in favor of Mosher against IMI, as an individual obligor upon an individual undertaking by IMI, had nothing whatsoever

to do with Mosher's claim against Union, and its resulting claim against Fluor and the Sureties, excepting, solely, to reduce the amount thereof by the amount of its recovery in the bankruptcy proceeding. On the other hand, Mosher's recovery in the Bankruptcy Court as an individual creditor of IMI, sharing equally with all other individual creditors of IMI in the individual assets of IMI, is an absolute bar, under the Bankruptcy Act, to Mosher's claim in this action that the individual debt upon which it recovered against IMI was not an individual debt at all but a firm debt which entitles it to recover from Ward as an incident of partnership law.

Contrary to the opinion of the Court of Appeals herein, there is not an iota of difference between the facts in this case and the facts presented to the Tenth Circuit in *Eads Hide & Wool Co.* v. *Merrill*, 252 F. 2d 80. The only difference between the two is the inclusion in Mosher's proof of claim against IMI of a statement that the claim was being filed "without prejudice to its rights against the said Ward Industries Corporation" because the "claimant corporation claims that Ward Industries Corporation *as joint venturer with the debtor*, . . ." is "*also* liable to claimant corporation for the entire debt . . ."

It was not the function of the Bankruptcy Court to determine the propriety, sufficiency or validity of Mosher's claim against Ward as a member of the joint venture. The Bankruptcy Court was dealing solely and only with the issues submitted to it by Mosher as an individual creditor of IMI in IMI's individual bankruptcy proceedings. By the judgment rendered therein, Mosher established the juridically conclusive fact that the obligation created by the IMI purchase orders was an individual obligation of IMI and not an obligation of the joint venture of IMI-Ward.

The alleged "express retention of rights" in the bankruptcy proceedings to which the Court of Appeals referred in its opinion does not warrant and cannot justify the total destruction of the scheme of distribution embodied in the Bankruptcy Act, 11 U.S.C. § 23 (g), repeatedly enforced by this Court and the several Courts of Appeals. In the language of this Court in *Schall* v. *Camors*, 251 U. S. 239, 255, no claimed retention of rights, whether couched in the words "without prejudice" or otherwise, or any other legalistic stratagem or maneuver:

> ". . . can displace the equities of other creditors, recognized in the Bankruptcy Act, and *put petitioners in a position of equality with others who actually were creditors of the individual partners, and of preference over other firm creditors.* Reynolds v. New York Trust Co., 188 Fed. 611, 619, 620, 110 C.C.A. 409, 39 L.R.A. (N.S.) 391." (Itals. ours)

CONCLUSION

For all of the reasons stated herein and in its petition, Ward Industries Corporation respectfully prays that its petition for a writ of certiorari be granted by this Court.

Respectfully submitted,

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